MALAYAN BANKING BHD.

v.

BAKELITE MANUFACTURE SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C6068 OF 1985]
1 NOVEMBER 1991

CONTRACT: *Guarantee - Whether creditor estopped from proceeding against guarantors - Whether guarantors had been discharged - Contracts Act 1950, ss. 92, 94.*

CIVIL PROCEDURE: *Summary judgment - High Court Rules, O. 14.*

This is an appeal by the defendants against the decision of the SAR ordering final judgment be entered against the second, third and fourth defendants (the "said defendants"). The said defendants were guarantors in respect of a loan granted by the plaintiff to the first defendant.

During the appeal, Counsel for the said defendants submitted that the plaintiff had acted negligently in failing to safeguard the assets of the first defendant, as a result of which their value had greatly diminished. Counsel also submitted that since the value of the security for the loan was sufficient to discharge the liability, the plaintiff was estopped from proceeding against the said defendants until they had first realised the assets from the first defendant. Counsel also submitted that the said defendants had been discharged as guarantors upon their resignation as directors of the first defendant.

Held:

[1] What is relevant in this appeal is the letter of guarantee. If there was any negligence, the defendants are entitled to claim damages by way of counterclaim.

[2] The said defendants are still liable under the letter of guarantee. The letter of guarantee allows a guarantor to give notice of revocation of his guarantee in respect of "future transactions" provided that the notice is given in writing. The notice by the said defendants were not in conformity with the terms of the letter of guarantee as the notice was only copied to the plaintiff and not addressed to them. In any case, the said defendants did not ask, in their letters, to be released in respect of future transactions.

[3] Consequently, the said defendants are still liable under the letter of guarantee.

[Appeal dismissed.]

Legislation referred to:
Contracts Act 1950, ss. 92, 94
Rules of the High Court 1980, O.14

For the plaintiffs - Siew Yew Ming; M/s. Soo Thien Ming & Shahrizat
For the 2nd, 3rd and 4th defendants - Joseph Yeoh; M/s. Sri Ram, Zulkifli & Kumar

JUDGMENT

Zakaria Yatim J:

This is an appeal by the second, third and fourth defendants against the decision of the SAR given on 26 May 1988 ordering that final judgment be entered against the second, third and fourth defendants pursuant to O. 14 of the Rules of the High Court 1980.

The first defendant is a private limited company incorporated in Malaysia having its place of business at 57-3, Jalan 2/64A, Udarama Complex, Off Jalan Ipoh, Kuala Lumpur. It was at all material times the customer of the plaintiff. According to the statement of claim, a sum of RM35,749.06 was due to the plaintiff as at 31 July 1985 under an overdraft facility granted to the first defendant by the plaintiff at the first defendant's request. The plaintiff also claims interest on that sum at the rate of 13.25% per annum with monthly rests from 1 August 1985 to the date of realisation. The plaintiff further claims against the first defendant for a sum of RM28,120.79 and RM17,226.25 both as at 31 July 1985 due under inward bills purchased granted to the first defendant's request together with interest thereon at the rate of 13.25% per annum from 1 August 1985 to the date of realisation. The plaintiff further claims against the first defendant for the sum of RM1,910 as at 31 July 1985 due under a trust receipt facility granted to the first defendant by the plaintiff at the first defendant's request together with interest thereon at the rate of 15.25% per annum from 1 August 1985 to the date of realisation. In consideration of the plaintiff granting the aforesaid facilities to the first defendant, the second, third and fourth defendants together with the fifth defendant by executing a letter of guarantee dated 22 May 1981. Despite repeated demands by the plaintiff, the defendants failed to pay the outstanding sums due.

At the hearing of the appeal, Mr. L. Sabapathy, Counsel for the second, third and fourth defendants submitted that the plaintiff was acting negligently in that it failed to safeguard the assets of the first defendant. As a result, the value of the assets was greatly diminished. He contended that it was the duty of the plaintiff to protect these assets. He further contended that the plaintiff was the debenture holder of the first defendant's assets. In support of his contention he referred to the affidavit on the third and fourth defendants affirmed on 20 August 1987, which *inter alia* states:

> At all material times, the first defendant were the tenants of an entity known as Woo Chor & Sons Sdn. Bhd. (landlords) which said entity was owned and/or controlled by us.
>
> On or about October 1985, the said landlord had caused distress proceedings (Distress Suit 101 of 1985) against the movable property of the first defendant at Lot 8, Lorong 19/1A (Block C), Petaling Jaya, Selangor (the premises) on account of unpaid rentals due from he first defendant to the said landlord.
>
> On about 22 April 1986, on the application of the plaintiff and on the grounds that the same were debenture holders the Court ordered that various goods distrained be released to the plaintiff.
>
> Despite matters aforesaid, it is within our knowledge that the plaintiff has failed to remove the aforesaid goods from the premises, nor have they caused to realise the same to answer for the first defendant's liabilities and further have caused the landlord to suffer further loss and damage by way of loss rentals on the premises.
>
> The said goods by reason of the lapse of a considerable period of time have greatly diminished in its resale value.

In my opinion what is relevant here is the letter of guarantee. In any event, if there was any negligence, the second, third and fourth defendants are entitled to claim damages by way of counterclaim.

Mr. Sabapathy next referred to the affidavit of the second defendant affirmed on 27 August 1987 where the deponent averred that the assets of the first defendant under the debenture were sufficient to meet the debt of the first defendant. He added that the plaintiff was estopped from proceeding against him unless they had first realised the assets of the first defendant. In paras. 6 and 7 of his affidavit, the second defendant said:

I am advised by Mr. Woo Chor and verily believe that at all material times the assets of the first defendant under the said debenture were sufficient to answer the alleged debt due and owing to the plaintiff by the first defendant. In this respect since my said resignation, I am unaware of the exact nature of banking business transacted between the plaintiff and the first defendant.

By reason of matters aforesaid, the plaintiffs are in all the circumstances of the case estopped from proceeding against me until and unless they have first resorted to and realised the assets of the first defendant to answer for the first defendant's alleged indebtedness to the plaintiff.

The defendants' next ground was that they had been discharged as guarantors. In their affidavit affirmed on 20 August 1989, they stated:

Sometime in August 1984, we had disposed off our shareholding interests in the first defendant largely to the fifth defendant and at the same time tendered our resignation as directors of the first defendant which said resignations were accepted. There is now produced and shown to us and marked exhibits as follows copies of certain documents pertaining to the said disposal and resignation:

(a) Exhibit marked "W1" - A copy of the third defendant's undated letter to the first defendant.

(b) Exhibit marked "W2" - A copy of the fourth defendant's letter dated 28 August 1987 to the first defendant.

Both the letters referred to and exhibited under para. 4 hereof were copied to, *inter alia*, the plaintiff informing the same of our withdrawal as guarantors of banking facilities afforded to the first defendant.

Mr. Sabapathy referred to ss. 92 and 94 of the Contracts Act 1950 and submitted that the second, third and fourth defendants had been discharged as guarantors. According to him, after the guarantors were discharged, the plaintiff continued providing the facilities to the first defendant. He contended that in the circumstances, his clients were not liable.

The main contention of the second, third and fourth defendants was that they had been discharged from the guarantee. The defendants claimed that they had disposed of their shares in the first defendant and had resigned as directors. Subsequently the third defendant wrote a letter to the first defendant informing the first defendant that he was releasing himself from all guarantees. The letter is reproduced below:

M/s. Bakelite Manufacture Sdn. Bhd.
Lot 8, Lorong 19/1A,
Petaling Jaya.

Dear Sir,

Re: Resignation as Director

With reference to the above, I have resigned as director of the above company with effect from 1 August 1984 and such hereby releasing myself from all guarantees and indemnities executed by myself in my personal capacity and or in my capacity as a director of the above company where the same had been executed for the benefit advantage and or gain of the company.

Since my resignation had been accepted by the Board of Directors, I hereby am referring all guarantees, indemnities, transaction or whatsoever before my resignation to you and your new Board of Directors. (that is Mak Kam Thong, Ng Koon Yew and Aw Cheng Peng).

Yours faithfully,

Sgd (Woo Chor).

The fourth defendant also wrote a similar letter to the first defendant. Both letters were copied to the plaintiff. On 27 September 1985, the plaintiff wrote to the third defendant stating that the letter was still liable as a guarantor for the facilities. The plaintiff's letter is reproduced below:

27 September 1985

Mr. Woo Chor,
44, Jalan Telawi Sembilan,
Bangsar Baru,
Kuala Lumpur.

Dear Sir,

Re: Bakelite Manufacture Sdn. Bhd.

We refer to your letter dated 23 September 1985 and are to advise that your request to be released from the guarantee executed for the benefit of the company has not been met with approval from our Head Office yet.

Meanwhile, you are still liable as a guarantor for facilities afforded to the above company.

Thank you.

Yours faithfully,

for Malayan Banking Bhd.

sgd

Tan Kim Chuan,
Branch Manager,
Petaling Jaya.

Clause 5(ii) of the letter of guarantee states:

> This guarantee shall be without prejudice to and shall not be affected nor shall we or any of us be released or exonerated by any of the matters following:
>
> (ii) the variation exchange renewal release or modification of any such securities or the refusal or neglect to complete enforce or assign any judgment specialty or other security or instrument negotiable or otherwise and whether satisfied by payment or not;
>
> (iii) any time given or extended to the to customer and/or any other person or persons including any of ourselves and the parties to any negotiable or other security instrument guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the customer and/or any other person or persons whether with or without consent to us.

Clause 6 of the same letter of guarantee states:

> This guarantee shall not be determined or affected by the death or insanity of myself or any one or more of us but shall in all respects and for all purposes be binding and operative until determined as to future transactions by fourteen days' notice in writing given to you by us or anyone of us by the personal representatives of any of us who may be dead or in case of insanity of any of us by the person legally entitled to represent the insane person. During the pendency of such notice you may subject always to the aforesaid limit of our liability hereunder fulfil any requirements of the customer based on agreements express or implied prior to the receipt of such notice and you may afford the customer such further accommodation as you would have done had you not received such notice and any moneys thereby due or remaining unpaid at or after the expiration of such notice shall form part of the aforesaid general balance.

> In the event of determination of our liability under this guarantee you shall be at liberty without thereby affecting your rights hereunder to open a new account or accounts and to continue any then existing accounts with the customer and no moneys credited to such accounts by or on behalf of the customer and subsequently withdrawn by it shall on settlement of our liability on this guarantee be appropriated towards or have the effect of repayment of any of the moneys due from the customer at the time when this guarantee is determined unless the persons paying in such moneys direct you in writing at the time to appropriate them to that purpose.

I have considered the evidence and the submissions of Counsel for both parties and I am satisfied that the second, third and fourth defendants are still liable under the letter of guarantee. Clause 6 of the letter of guarantee allows a guarantor to give notice of revocation of his guarantee in respect of "future transactions" provided that the notice is given in writing within fourteen days. The defendants have not complied strictly with the terms of Clause 6. The letters were not addressed to the plaintiff but only copied to them. In the letters the defendants are not asking to be released in respect of "future transactions." James O'Donovan, in the *Modern Contract of Guarantee* [1985] at p. 342 states:

> The guarantor may revoke the guarantee when the contract provides that it is revocable by notice. The revocation must be explicit, not merely being the expression of a wish by the guarantor that the guarantee be withdrawn, and must also comply strictly with the terms of the clause of revocation ...

In my opinion the second, third and fourth defendants are still liable under the letter of guarantee. In the circumstances I dismiss their appeal with costs.

Also found at [1992] 1 CLJ 444